***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

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P/B's

# 75-1371

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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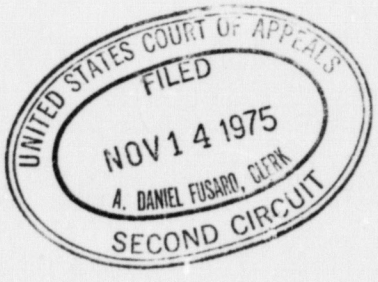
| UNITED STATES OF AMERICA, Appellant, -against- ISRAEL RODRIGUEZ, Defendant-Appellee. | Docket No. 75-1371 |

BRIEF FOR APPELLEE
ISRAEL RODRIGUEZ

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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## QUESTION PRESENTED

Whether the District Judge's finding that the Government was in violation of the Prompt Disposition Plan, thus requiring him to dismiss the indictment, was correct and should be sustained.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This appeal is taken by the Government from orders of the United States District Court for the Eastern District of New York (The Honorable John R. Bartels) entered on September 9 and 18, 1975, dismissing an indictment charging appellee Israel Rodriguez with conspiracy to distribute cocaine and possession of that drug with intent to distribute.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel for Mr. Rodriguez on appeal.

### Statement of Facts

On December 3, 1974, Luis and Jose LaBoy and appellee Rodriguez were arrested for an alleged attempted sale of cocaine to a Government undercover agent. The three were arraigned on December 4, 1975.

On February 14, 1975, an indictment was filed charging the LaBoys with conspiracy between November 21, 1974, and December 3, 1974, to distribute cocaine through a sale to an undercover agent named Ronald Melvin. A second count of the indictment charged the two men with possession with intent to distribute cocaine. Appellee Rodriguez, however, was not indicted. On March 10, 1975, the LaBoys were

arraigned. The Government filed a notice of readiness on May 2, 1975, and a trial date of May 19, 1975, was set.

On May 19, 1975, the day set for the trial of the LaBoy brothers, the Assistant United States Attorney requested an adjournment of the proceedings, saying, "It is my intention to indict [appellee Rodriguez] this afternoon" (M.3).

Counsel for LaBoy asserted that the Government had an opportunity to present to the grand jury the case against appellee Rodriguez, but had failed to do so (M.3), and asserted that he was ready for trial and objected to a postponement (M.7).

Assistant U.S. Attorney Corcoran explained that he had never spoken with the Government informer, that he had relied on the undercover agent's reports for his presentation to the grand jury, and that he did not know about Rodriguez' involvement in the crime. Assistant U.S. Attorney Marks stated that the case had been reassigned to him over the weekend (M.8) and that when he met the informer on May 17, the Saturday prior to the trial date, he learned of that information (M.12). Mr. Marks asserted that on Sunday, May 18, 1975 (M.11), he telephoned Rodriguez and told him that two agents would pick him up and bring him to the courthouse for an interview (M.11). At that point, Rodriguez allegedly volunteered the invormation that he was testifying for the

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*Pages of the transcript of this May 19, 1975, proceeding are designated by numberals in parentheses preceded by "M".

defense (M.11).

Mr. Marks asserted that he was prepared to go to trial as soon as Rodriguez had an opportunity to prepare his case (M.13). The District Judge noted that this action by the Government had put everyone in an embarrassing position because the Judge could not try any cases until July, due to his scheduled vacation (M.13).

The Judge agreed to hold the LaBoys' suppression hearing pursuant to Rule 41 of the Federal Rules of Criminal Procedure that day and otherwise to adjourn the case until a date convenient for counsel some time after June.*

The Judge then instructed someone to get in touch with Joanna Seybert, the attorney with The Legal Aid Society, Federal Defender Services Unit, who had been assigned to represent Rodriguez at the preliminary proceedings before the magistrate but who was not then in court (M.14; Minutes of July 18, 1975, at 16). When Ms. Seybert appeared, Judge Bartels informed here that Rodriguez was to be indicted that afternoon (M.16**), told her to confer with other counsel about her schedule (M.16), and stated that everything counsel for the LaBoys received on behalf of their clients would be delivered to her (M.16). Co-counsel then stated that all

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*Judge Bartels was to be on vacation during June.

**The transcript at line 9 is obviously erroneous when it states that it "hasn't" been decided. Such errors appear throughout the transcript.

defense counsel agreed on July 29, 1975 (M.17) as a trial date. Ms. Seybert stated that, in response to her inquiry, the Assistant U.S. Attorney advised her that the six month period had not passed (M.17; Minutes of July 18, 1975, at 6). Judge Bartels then set July 29, 1975, as the date for trial, subject to further adjournment to August 4, 1975 (M.17).

The record also indicates that Ms. Seybert apparently left the courtroom, since someone was directed to get in touch with her (M.18) so that she could sit in on the suppression hearing about to be held (M.22). When she returned to the courtroom, Ms. Seybert explained:

> I have about four other matters, including an 11:00 o'clock calendar at the Magistrate's office....
>
> I haven't seen Mr. Rodriguez in several months and I am not prepared to proceed on any suppression hearing.
>
> (M.21).
>
> I am not prepared for this motion at this point in time. My client has not yet been indicted.
>
> I am not familiar with the law but the DeBello case involving a pre-indictment hearing as to one defendant, not knowing the full implications of that hearing, I request that the Court allow myself and Mr. Rodriguez to remain in the courtroom and permit us to make our own separate motion and not join in this motion.
>
> My client may not be indicted this afternoon. At this time he is not an indicted defendant.
>
> (M.24).

Judge Bartels agreed to permit her to make any further motions she wanted to make for appellee Rodriguez, but required her presence in the courtroom. The LaBoys' suppression hearing then took place.

On May 19, 1975, a superseding indictment was filed charging a conspiracy among appellee Rodriguez and Luis and Jose Laboy to distribute cocaine on November 21, 1974, and possession of cocaine with intent to distribute.

It was not until May 28, 1975, that a notice was sent by the United States Attorney's office, scheduling the arraignment for June 5, 1975, two days after the expiration of the six month period, and at a time when it was known that Judge Bartels would be on vacation.

On June 6, 1975, in the absence of Judge Bartels, the arraignment was held before Judge Orrin G. Judd. Defense counsel stated that she had received no notice of the indictment until May 28, 1975, and that entry of a plea of not guilty was not to be construed as a waiver of rights under the Prompt Disposition Plan (Minutes of June 6, 1975, at 7). Counsel also indicated that she had not "really been informed of any discovery," and the Assistant U.S. Attorney agreed to give the material to her (Minutes of June 6, 1975, at 8).

On June 30, 1975, the Government filed a notice of readiness for trial.

By notice of motion dated July 8, 1975, defense counsel sought dismissal of the indictment for failure to comply with

the "prompt disposition" rules.

In his affidavit in opposition* to the motion to dismiss, Assistant U.S. Attorney Marks reiterated that the United States Attorney's office had not sought an indictment against appellee Rodriguez because, from December 3, 1974 -- the date of the crime -- until May 17, 1975 -- two days prior to the scheduled trial -- no prosecutor had ever interviewed the Government's informant in the case, although the informant's identity was known. Mr. Marks further asserted that he had told everyone in court on May 19, 1975, that he was otherwise ready for trial.**

On July 18, 1975, argument on the motion to dismiss commenced with a colloquy between the District Judge and the prosecutor concerning the latter's failure to file any papers responsive to the motion. Defense counsel detailed the prior events.

Judge Bartels asked for an explanation of the delay in the indictment of Rodriquez, saying he believed the indictment was handed up because Rodriguez was scheduled to testify on behalf of the other defendants:

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*This affidavit was filed after oral argument on the motion to dismiss.

**Mr. Marks further asserted that Ms. Seybert had not participated in the suppression hearing in order to avoid a waiver of the six-month rule. However, as shown above, counsel made it clear that she was not prepared to represent Mr. Rodriguez, having been unexpectedly called in on the case just a few minutes previously.

> ... As a matter of fact, as I recall, Rodriguez was going to come down and testify in behalf of the defendants[;] because of that fact, you thought you would indict him.
>
> * * *
>
> ... I could be wrong. You never had, this is the impression I got, you never had any intention to indict him. Until you learned he was going to get on the stand in behalf of the defendants. Then you decided to bring him in so that would prevent that. At least dilute the effect of his testimony on behalf of the defendants; is that true?
>
> (Minutes of July 18, 1975, at 14-15).

The prosecutor denied that assertion, again stating that the prior investigation by the United States Attorney's office had been based only on the agent's report and that the prosecutor had failed to learn from its own informant about Mr. Rodriguez' alleged role in the crime (Minutes of July 18, 1975, at 15-16).

On September 8, 1975, Judge Bartels dismissed the indictment. In his opinion,* Judge Bartels found that the six month period expired on June 3, 1975, and that, although the Government had announced its readiness on May 19, 1975, the failure to calendar the case for arraignment on or before June 3, 1975, was a clear violation of Rule 4 of the Prompt Disposition Plan. Relying on United States v. Bowman, 493 F.2d 594 (2d Cir. 1974),

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*The text of Judge Bartels' opinion dated September 8, 1975, appears at 41 of the Government's appendix.

and United States v. Valot, 473 F.2d 667 (2d Cir. 1974), the Court concluded that a notice of readiness is not effective until issue is joined. The District Judge found no excusable neglect which would permit a delay, and also stated:

> ... The Government attempts to explain its failure to indict Rodriguez until May 19, 1975, on the ground of newly discovered evidence from an informant. It must be noted, however, that the reason for the delay in receiving this new information was the failure on the part of the attorneys for the Government to interview the informant until two days prior to the scheduled trial date despite the fact that his identity was known. Instead of interviewing the informant himself, the Government chose to rely solely on an agent's report concerning the information available from the informant. This clearly amounted to inadequate investigation.
>
> (Opinion of September 8, 1975, at 4-5; Government's Appendix at A.44-45).

The Government then sought reconsideration of the order dismissing the indictment. It was argued that the Government had complied with the rules by the oral notice given on May 19, 1975, and, because on May 19, both a trial date had been set and discovery ordered, the arraignment was meaningless. Alternatively, the Government stated that the late arraignment was due to excusable neglect. In rejecting the Government's position that it was ready for trial, the District Court stated:

> ... Readiness without the ability to go to trial is meaningless.
>
> (Minutes of September 16, 1975, at 20).

In an opinion dated September 18, 1975 (Government's Appendix at A.48), Judge Bartels reaffirmed his earlier decision:

> [The argument that the late arraignment in this case was a mere formality] ignores the simple fact that Rule 4 of the Plan required the Government to be ready for trial within six months from the date of Rodriguez's arrest and that having failed to arraign Rodriguez within that six-month period, it could not possibly have been ready for trial until three days after the six months since until arraignment it would have been impossible to try the case.... While the Bowman Court did not require that the case be actually tried within the six-month period, it held that in order to be ready for trial the Government must first arraign the defendant. The essence of that requirement and the concern of the Court were to insure the prompt disposition of criminal cases by avoiding all forms of prosecutorial delay, including delay in arraignment....
>
> An arraignment serves a much more important purpose than simply providing a time for the assignment of a judge, who in turn will set a trial date and order discovery; as stated in Bowman, the purpose of Rule 4 was "to insure that the government would file its notice of readiness only after pleading." Id. It is true that while on May 19, 1975, all material turned over to the other defendants was ordered delivered to to Rodriguez, his counsel was expressly accorded the right to make any motions at a later date. Under Rule 16(f) Rodriguez had a right to make discovery motions at any time within ten days after arraignment or at such later date as the Court might permit. As a matter of strict procedural requirements, it is impossible to try a defendant before his plea. In this case, it was expected that Rodriguez would certainly be arraigned before the expiration of the six-month period.
>
> (Opinion of September 18, 1975, at 3-5; Government's Appendix at A.50-52).

Judge Bartels also concluded that there was no excuse for the delay in arraignment and thus no excusable neglect.

## ARGUMENT

THE DISTRICT JUDGE'S FINDING THAT THE GOVERNMENT WAS IN VIOLATION OF THE PROMPT DISPOSITION PLAN, THUS REQUIRING HIM TO DISMISS THE INDICTMENT, WAS CORRECT AND SHOULD BE SUSTAINED.

The statement which the Assistant U.S. Attorney made in court on May 19, 1975, the date set for trial of the LaBoys, that he would be ready for trial after appellee Rodriguez had an opportunity to prepare, failed to comply with the provisions of the Prompt Disposition rules and the decisions of this Court applying those rules. Indeed, the problem must have been perceived by the prosecutor, since a written notice was filed on June 30, 1975, albeit twenty-seven days late.

The prosecutor's oral notice to the court was given before Mr. Rodriguez had been indicted, and thus, quite obviously, at a time when Rodriguez had not pleaded to the charges. Since neither of the required pleadings (see Rule 12, Fed.R. Cr.P.) was before the court, there was nothing before the court which could be tried.

The arrogant assurance by the Assistant U.S. Attorney that "he would indict" Rodriguez that afternoon, while summarily disposing of the usual respect shown to the grand jury

in its role as a buffer between the Government and its citizenry (Branzburg v. Hayes, 408 U.S. 665, 686-687 and n.23 (1972); Wood v. Georgia, 370 U.S. 375, 390 (1962)), was, as defense counsel pointed out, merely a statement of intention: her client was not yet indicted, and in fact might not be charged.

Indeed, if the rules could be satisfied by the practice of announcing readiness for trial before presentation of the case to the grand jury -- the practice employed by the Government here -- it would unavoidably encourage the very kind of careless and incomplete investigation which was conducted by the Government in this case, resulting in the delay in presentation of the case to the grand jury. The Government chooses to characterize as "newly discovered" (Government's Brief at 2, fn.1) the evidence against Rodriguez which was to be presented to the grand jury, thereby necessitating the adjournment of the LaBoys' trial. However, the evidence was obtained from the known and available informant, who simply remained uninterviewed by anyone in the prosecutor's office from December 3, 1974 -- the date of the crime -- to May 17, 1975 -- two days prior to the date set some time earlier for the trial of the LaBoys. Judge Bartels properly rejected the Government's characterization of this evidence as "newly discovered," and found that the Government's investigation had been "inadequate" (Opinion of September 8, 1975, at 5; Government's Appendix at A.45), and the indict-

ment against Rodriguez "dilatory" (Opinion of September 18, 1975, at 5; Government's Appendix at A.52).

Thus, Judge Bartels found that the inadequate investigation, which delayed more than five months the presentation of the case against Mr. Rodriguez to the grand jury, was a contributing factor to its violation of the six month rule.

Despite its poor investigation, though, the Government still had an opportunity to bring its case against Rodriguez in a timely fashion had it then acted properly within the precedents of this Court. However, the Government did not proceed in such a manner. Instead, inexplicably, the Government filed a notice setting arraignment for a time after the six month period.

At the time the prosecutor made his statement on May 19, 1975, Mr. Rodriguez obviously could not have entered a plea to the indictment. Relying on United States v. Bowman, 493 F.2d 594 (2d Cir. 1974), Judge Bartels concluded that the notice of readiness could not be filed prior to the pleading:

> ... Our purpose [in United States v. Valot, 473 F.2d 667 (2d Cir. 1974)] was to insure that the government would file its notice of readiness only after pleading and that, absent exceptional circumstances permitting an extension of time pursuant to Rule 5(h), this must be done within the six-month period of following arrest, after excluding any other periods as authorized by Rule 5. Even though the government might be ready to go to trial at an earlier date, its readiness could not become effective as a practical matter until issue had been joined, whereupon the case could be assigned to a judge for all purposes, including the dis-

> position of pretrial motions and the conduct of the trial itself.
>
> Id., 493 F.2d at 597.

The significance of Bowman is that readiness for trial encompasses not merely the completion of the Government's investigation and evidence-collection process, but also that it requires readiness in a legal sense, taking into account whether, under procedural rules, the case can in fact be tried. It is beyond dispute that the case cannot be tried prior to pleading. Under Rule 2(b) of the local rules of the Eastern District, the date for arraignment is set by the United States Attorney:

> The United States Attorney shall arrange with the judge to whom the case has been assigned, or, in his absence or unavailability under Rule 5(b) with the Miscellaneous Part Judge, to have the person arraigned and required to plead as promptly as practicable.

The procedure, followed here, is for the Assistant U.S. Attorney to mail defense counsel a notice of the arraignment date. The notice in this case was sent to defense counsel eight days after the indictment was filed. In his notice, the prosecutor selected for arraignment a date falling after the expiration of the six month period.*

Additionally, the Assistant U.S. Attorney was aware of the potential six-month problem, because defense counsel had

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*That the delay here was only two days is of no significance: there is no de minimus rule. United States v. McDonough, 504 F.2d 67 (2d Cir. 1974).

told him about it on May 19.

The delay in this case was entirely the responsibility of the prosecutor and, as Judge Bartels emphasized, the focus of the Prompt Disposition Rules was primarly to prevent such prosecutorial delays. Hilbert v. Dooling, 476 F.2d 355, 357 (2d Cir. 1973).

Further, although the rules do not require that a trial actually be held within six months, their purpose is to require the Government to be ready within that time so as to permit disposition of criminal charges with reasonable dispatch (Hilbert v. Dooling, supra, 476 F.2d at 357). Here, although the Government knew of Judge Bartels' vacation schedule, it set an arraignment date after his departure, thus requiring that the proceeding take place before a different judge, obviously delaying the scheduling of dates for pretrial motions by the defense.* In this instance, as the District Judge recognized, there was at least one substantial issue to be raised in a pretrial motion to dismiss -- whether the decision to indict Rodriguez and to try him with the LaBoys was undertaken because Rodriguez was scheduled to be a defense witness.

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*Judge Bartels stated that although Ms. Seybert was required to sit in on the LaBoys' suppression motion hearing, she could make her own motions on behalf of her client at a later time.

The Government argues that Bowman does not apply here because Judge Bartels had been assigned to the case and was thus in "control," and because, on May 19, 1975, discovery was ordered and a trial date set for July 29, 1975. From this, the Government argues that the arraignment date is of no significance.

As indicated above, however, the local rules of the Eastern District anticipate prosecutorial control of the arraignment date.* Therefore, even if a judge is assigned, the case cannot move forward unless the United Staets Attorney also acts to set a date for pleading. The setting of a trial date could not cure the failure to set a timely arraignment date, for, as Judge Bartels noted:

> ... Under Rule 16(f) Rodriguez had a right to make discovery motions at any time within ten days after arraignment or at such later date as the Court might permit. As a matter of strict procedural requirements, it is impossible to try a defendant before his plea and for that reason the setting of a trial date is meaningless before the defendant has entered his plea. In this case it was expected that Rodriguez would certainly be arraigned before the expiration of the six-month period.
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> (Opinion of September 18, 1975, at 4-5; Government's Appendix at A.51-52).

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*It should be noted that, under local Rule 2 of the Eastern District Rules, it is also the responsibility of the United States Attorney to refer a filed indictment to the Clerk of the Court for assignment to a judge. The Government's analysis of Eastern District practice (Government's Brief at 8) makes no reference to Rule 2, and is simply inaccurate.

In addition, the amended Rule 12 of the Federal Rules of Criminal Procedure anticipates that pretrial motions will be made and heard after arraignment. Thus, a delay in the arraignment will disrupt the Federal scheme for pretrial motions.

Significant, too, is the fact that although defense counsel indicated that she would be available on July 29, 1975, her statement could in no way constitute a decision on her part that she was agreeing to a firm trial date* or a waiver of rights under the six-month rule. Counsel was quite literally called in from the corridor of the courthouse while en route to another matter. She had neither her own schedule with her nor the file for this case. She made clear that she had four other cases on that day, that she was unprepared for this proceeding, and that she had not spoken to Rodriquez in several months.

In addition, as the proceedings of July 6, 1975 -- the arraignment of Rodriguez -- reveal, the Government had failed to comply with Judge Bartels' order to turn over to defense counsel the discovery materials, thereby further delaying the proceedings.

It should be noted that notice of readiness in this case was given when counsel was not in the courtroom, and that the

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*Indeed no one was under that impression, since Judge Bartels left it open for trial on August 4. The LaBoys case did not actually go to trial until September.

warnings of United States v. Pierro, 478 F.2d 386 (2d Cir. 1973), were not heeded. The Government cites Pierro for the proposition that its oral notice on May 19 was a technical violation which produced no prejudice (Government's Brief at 7). In United States v. Johnson, Doc. No. 75-1196, slip op. 321, 324 (2d Cir., October 30, 1975), this Court made clear that the technicality of which it spoke in Pierro was the making of an oral statement in the absence of counsel where no other default by the Government was present. That is obviously not the circumstance here.

Further, although the Government asserts that this is a unique case, its use of oral statements of readiness has occurred in other matters. See United States v. Neubauer, 75 Cr. 175 (E.D.N.Y. July 11, 1975, Neaher, J.).

In this case Judge Bartels decided not once, but twice, that the Government had acted in violation of the Rules. He was correct, and the dismissal of the indictment should be affirmed.

## CONCLUSION

For the foregoing reasons, the order of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

November 14 , 19 75

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Eastern District of New York.